

NOT FOR CITATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RAYMUNDO PALACIOS,

Plaintiff,

vs.

ANTHONY A. KANE, Warden; G.A.
ORTIZ, AW(A); J. SISK, AW(A); J.A.
SOASES, Captain (A); L. CHAVEZ,
Lieutenant,

Defendants.

No. C 06-7619 PJH (PR)

ORDER OF SERVICE

This is a civil rights case filed pro se by a state prisoner. Plaintiff alleges that defendants failed to protect him and that he was attacked as a result. In the initial review order the court dismissed the complaint with leave to amend because plaintiff had not mentioned defendants other than Chavez, and as to Chavez, had not alleged sufficient facts to state a claim that Chavez was deliberately indifferent to his safety. He has amended, deleting all defendants except Chavez. The other defendants therefore will be dismissed from the case. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir.1992) (defendants not named in an amended complaint are no longer defendants).

1. Review of amended complaint

As to Chavez, the defect of the original complaint was that plaintiff had not alleged facts which suggested that Chavez should have been aware of a genuine danger to plaintiff's safety. In the amended complaint, plaintiff alleges that his family called Chavez to inform him that plaintiff was in danger, and that when Chavez interviewed plaintiff, plaintiff told him that he needed protective custody but would not or could not provide the names of

1 his potential assailants. He also alleges that he told Chavez that the assailants were going
2 to "remove him from the yard" because they thought he was a child molester, and told him
3 that when plaintiff could not provide arrest records or reports, "this caused even greater
4 resentment." Plaintiff was knifed later that day.

5 This is sufficient to require a response.

6 *2. Motion for counsel*

7 Plaintiff moves for appointment of counsel.

8 There is no constitutional right to counsel in a civil case. *Lassiter v. Dep't of Social*
9 *Services*, 452 U.S. 18, 25 (1981). 28 U.S.C. § 1915 confers on a district court only the
10 power to "request" that counsel represent a litigant who is proceeding in forma pauperis.
11 28 U.S.C. § 1915(e)(1). This does not give the courts the power to make "coercive
12 appointments of counsel." *Mallard v. United States Dist. Court*, 490 U.S. 296, 310 (1989).

13 The court may ask counsel to represent an indigent litigant under § 1915 only in
14 "exceptional circumstances," the determination of which requires an evaluation of both (1)
15 the likelihood of success on the merits and (2) the ability of the plaintiff to articulate his
16 claims pro se in light of the complexity of the legal issues involved. *Terrell v. Brewer*, 935
17 F.2d 1015, 1017 (9th Cir. 1991); *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir.
18 1986).

19 It is difficult to evaluate plaintiff's chances of success on the merits, given the early
20 stage of the case. In any event, plaintiff appears able to present his claims adequately, and
21 the issues are not complex. The motion for appointment of counsel will be denied.

22 **CONCLUSION**

23 1. Plaintiff's claims against defendants Kane, Ortiz, Sisk, and Soases are
24 **DISMISSED** with prejudice. His motion for appointment of counsel (document number 5 on
25 the docket) is **DENIED**.

26 2. The clerk shall issue summons and the United States Marshal shall serve,
27 without prepayment of fees, copies of the complaint with attachments and copies of this
28 order on the following defendant: Lieutenant L. Chavez. Plaintiff states that he can be

1 found at the Correctional Training Facility in Soledad.

2 3. In order to expedite the resolution of this case, the court orders as follows:

3 a. No later than sixty days from the date of service, defendants shall file a
4 motion for summary judgment or other dispositive motion. The motion shall be supported
5 by adequate factual documentation and shall conform in all respects to Federal Rule of
6 Civil Procedure 56, and shall include as exhibits all records and incident reports stemming
7 from the events at issue. If defendants are of the opinion that this case cannot be resolved
8 by summary judgment, they shall so inform the court prior to the date their summary
9 judgment motion is due. All papers filed with the court shall be promptly served on the
10 plaintiff.

11 b. Plaintiff's opposition to the dispositive motion, if any, shall be filed with the
12 court and served upon defendants no later than thirty days from the date the motion was
13 served upon him. Plaintiff must read the attached page headed "NOTICE -- WARNING,"
14 which is provided to him pursuant to *Rand v. Rowland*, 154 F.3d 952, 953-954 (9th Cir.
15 1998) (en banc), and *Klinge v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988).

16 If defendants file an unenumerated motion to dismiss claiming that plaintiff failed to
17 exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a), plaintiff
18 should take note of the attached page headed "NOTICE -- WARNING (EXHAUSTION)," which
19 is provided to him as required by *Wyatt v. Terhune*, 315 F.3d 1108, 1120 n. 4 (9th
20 Cir. 2003).

21 c. If defendants wish to file a reply brief, they shall do so no later than fifteen
22 days after the opposition is served upon them.

23 d. The motion shall be deemed submitted as of the date the reply brief is
24 due. No hearing will be held on the motion unless the court so orders at a later date.

25 4. All communications by plaintiff with the court must be served on defendants, or
26 defendants' counsel once counsel has been designated, by mailing a true copy of the
27 document to defendants or defendants' counsel.

28 ///

1 5. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.
2 No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16-1 is
3 required before the parties may conduct discovery.

4 6. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the court
5 informed of any change of address by filing a separate paper with the clerk headed "Notice
6 of Change of Address." He also must comply with the court's orders in a timely fashion.
7 Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to
8 Federal Rule of Civil Procedure 41(b).

9
10 **IT IS SO ORDERED.**

11
12 Dated: May 15, 2007.



PHYLLIS J. HAMILTON
United States District Judge

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28 G:\PRO-SE\PJH\CR.06\PALACIOS619.SRV

NOTICE -- WARNING
(SUMMARY JUDGMENT)

If defendants move for summary judgment, they are seeking to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact--that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendant's declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted, your case will be dismissed and there will be no trial.

NOTICE -- WARNING
(EXHAUSTION)

If defendants file an unenumerated motion to dismiss for failure to exhaust, they are seeking to have your case dismissed. If the motion is granted it will end your case.

You have the right to present any evidence you may have which tends to show that you did exhaust your administrative remedies. Such evidence may be in the form of declarations (statements signed under penalty of perjury) or authenticated documents, that is, documents accompanied by a declaration showing where they came from and why they are authentic, or other sworn papers, such as answers to interrogatories or depositions.

If defendants file a motion to dismiss and it is granted, your case will be dismissed and there will be no trial.